



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 28, 1994

Mr. Robert E. Diaz
Police Legal Advisor
Police Department
City of Arlington
P.O. Box 1065
Arlington, Texas 76004-1065

OR94-830

Dear Mr. Diaz:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 29681.

The City of Arlington (the "city"), through its police department, has received a request for certain personnel file information. Specifically, the requestor seeks the "[p]ersonnel files for Kenneth E. Karr, Chris Williams and Dennis Rhoten, including all decisions made by the Arlington Police Department's internal affairs office in regards to these employees, all reprimands, commendations and evaluations. . . . [t]he names of any complainants, the names of the officers who are the subject of complaints, the officer's written response to the complaint and the final disposition of a complaint. . . . [As well as,] each employee's age and law enforcement background." You advise us that the some of the requested information has been made available to the requestor. You seek, however, to withhold the remainder of the requested information from required public disclosure and claim that sections 552.101, 552.102, 552.111, 552.117, and 552.119 of the Government Code except it from required public disclosure.¹

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” You assert section 552.101 in conjunction with several authorities, including section 5.08 of the Medical Practice Act, V.T.C.S. article 4495b; section 611.002 of the Health and Safety Code; section 19A of the Polygraph Examiner’s Act, V.T.C.S. article 4413(29cc); the 1990 amendments to the federal Social Security Act, *see* 42 U.S.C. § 405(c)(2)(C)(vii); federal and state authorities governing the release of criminal history record information, *see* 28 C.F.R. § 20.21(c)(1); Gov’t Code §§ 411.087, .097(c); and common-law and constitutional privacy. We address each of these authorities in turn.

Section 5.08(b) of the Medical Practice Act, article 4495b, V.T.C.S., provides that “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician” are confidential. Records must be kept confidential under article 4495b only if they are actually prepared or maintained by a physician. Attorney General Opinion JM-229 (1984) at 2; Open Records Decision No. 343 (1982) at 1. The records submitted to us for review include information that was prepared by a physician. This information has been marked and may be released only as the Medical Practice Act permits. *See generally* Open Records Decision No. 565 (1990).

Section 611.002 of the Health and Safety Code makes confidential the records prepared by licensed psychologists², among others, and provides in pertinent part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

In Open Records Decision No. 565 (1990) at 3, this office concluded that the purpose of section 611.002’s predecessor, section 2(a), article 5561h, V.T.C.S., was to protect the patient or client against an invasion of privacy.³ Some of the submitted information constitutes the “records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional.” This information has been marked and must be withheld under section 611.002 of the Health and Safety Code.

²Section 611.001 of the Health and Safety Code defines “professional” in part as “a person licensed or certified by this state to diagnose, evaluate, or treat any mental or emotional condition or disorder.”

³Section 611.004 of the Health and Safety Code, which is not applicable here, provides for disclosure of information made confidential by section 611.002 to certain persons.

Section 19A of the Polygraph Examiner's Act, V.T.C.S. article 4413(29cc), provides, in pertinent part:

(b) Except as provided in Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

V.T.C.S. art. 4413 (29cc), § 19A; *see also* Open Records Decision Nos. 430 (1985); 316 (1982).

We understand that the polygraph information at issue here relates to an examination conducted for the city. We do not understand any of the exceptions to non-disclosure to apply in this instance. *See* V.T.C.S. art. 4413, § 19(c), (d). We have marked the information submitted to us for review that is "acquired from . . . [a polygraph] examination." The city must withhold the marked information from required public disclosure under section 552.101 of the Government Code.

The requested information also includes the social security numbers of city employees. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We note that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990. For example, an employer is required to obtain a new employee's social security number for tax purposes under a law that predates October 1, 1990, and thus, a social security number obtained under this law is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers at issue here are confidential under federal law. On the other hand, section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number contained in these documents, you should ensure that it was not obtained pursuant to a law enacted on or after October 1, 1990.

The submitted information also includes criminal history record information ("CHRI") distributed at the state and federal level. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."),

(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). In addition, section 411.097(c) of the Government Code prohibits the city from disclosing any CHRI obtained from the Department of Public Safety (DPS) or any other criminal justice agency. *See also* Gov't Code § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Finally, we note that CHRI information generated within the state of Texas and TCIC files must be withheld from required public disclosure under section 552.101 in conjunction with common-law privacy doctrine. *See* Open Records Decision Nos. 565; 216 (1978); *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public). Accordingly, pursuant to state law and federal regulations, the city must not release the submitted CHRI to the requestor.

You also assert section 552.101 in conjunction with common-law privacy and section 552.102 of the Government Code, which excepts "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴ Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v.* 540 S.W.2d at 685, *see Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training, kind of work, salary, reasons for leaving, and job performance or ability. *See* Open Records Decision No. 455 (1987); *see also* Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983).

The submitted information, however, includes the kind of information that this office has previously concluded falls within the protection of common-law privacy, including background financial information and medical history information. In Open Records Decision No. 373 (1983) at 3, this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded as follows:

⁴Section 552.102(b) also protects from required public disclosure transcripts from institutions of higher education in the personnel files of professional public school employees. Section 552.102(b) expressly excludes from this protection information on a transcript detailing the degree obtained and the curriculum pursued. *See* Open Records Decision No. 526 (1989). The requested information does not include the transcripts of professional public school employees.

all financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373, at 3. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.* at 4; *see also* Open Records Decision Nos. 600 (1992); 545 (1990). In Open Records Decision No. 545, this office applied a similar presumption to personal financial information of public employees and held that, absent "special circumstances," information concerning a public employee's participation in a deferred compensation plan is protected from disclosure by common-law privacy.⁵ Open Records Decision No. 545, at 4-5; *see also* Open Records Decision No. 600 (1992) at 9-12.

We conclude that the submitted background financial information is intimate or embarrassing. In addition, we are not aware of any "special circumstances" that give rise to a legitimate public interest in this information. We have marked this information and conclude that the city must withhold it under section 552.101 of the Government Code.

The submitted information also includes a city employee's medical history. While common-law privacy may protect an individual's medical history, *see, e.g.,* Open Records Decision Nos. 539 (1990); 455 (1987); 422 (1984), it does not protect all medically related information, *see* Open Records Decision No. 478 (1987). Individual determinations are required. Open Records Decision No. 370 (1983). This office had determined that common-law privacy protects the following medical information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death

⁵This office, however, has distinguished between background financial information and information regarding a particular transaction between the individual and a public body. *See* Open Records Decision Nos. 523 (1989); 373. For example, this office has held that the amount of a debt to a public hospital, together with the names of debtors and dates of delinquency, is not excepted by common-law privacy. Open Records Decision No. 385 (1983); *see also* Open Records Decision No. 523 (determining whether certain information in loan files of Veterans' Land Program is protected by right of privacy). Generally, the public has an interest in knowing who owes money to a governmental body. *See* Open Records Decision Nos. 480 (1987) (names and addresses of students who have received and defaulted on loans administered by the Texas Guaranteed Student Loan Corporation not protected by common-law privacy); 443 (1986) (city's utility bill ledgers not confidential under common-law privacy).

syndrome, Attorney General Opinion JM-81 (1983); and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress, Open Records Decision No. 343 (1982). We have marked the information that falls within this class of common-law privacy. The city must withhold the marked information under section 552.101 of the Government Code.

We note that some of the submitted information falls into none of the classes of information that this office has previously determined are protected by common-law privacy. Upon review, we conclude that this information is nonetheless intimate or embarrassing and of no legitimate public concern. This information has been marked and must be withheld from required public disclosure under section 552.101 of the Government Code.⁶

Next, we address your contention that section 552.111 of the Government Code excepts from disclosure the evaluation sheets completed during the interview process. Section 552.111 excepts from disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and concluded that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. In addition, this office concluded that an agency's policymaking functions do not encompass internal administrative or personnel matters. Open Records Decision No. 615, at 5-6. Having examined the submitted information, we conclude that it relates to an internal personnel matter. Accordingly, section 552.111 of the Government Code does not except them from required public disclosure.

Next, we address whether section 552.117 of the Government Code excepts from disclosure portions of the requested information. In pertinent part, section 552.117 excepts from disclosure the home addresses and telephone numbers of all peace officers, as defined by article 2.12 of the Code of Criminal Procedure, and the home addresses and

⁶You also assert constitutional privacy. The right to privacy guaranteed under the United States Constitution protects two related interests: (1) the individual's interest in independence in making certain kinds of important decisions, and (2) the individual's interest in avoiding disclosure of personal matters. See Open Records Decision No. 478 (1987) at 4. The first interest applies to the traditional "zones of privacy," *i.e.*, marriage, procreation, contraception, family relationships, and child rearing and education. See Open Records Decision No. 447 (1986) at 4. The second protects information by employing a balancing test that weighs the privacy interest against the public interest. Open Records Decision No. 478, at 4. It protects against "invasions of privacy involving the most intimate aspects of human affairs." Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985)). In this instance our discussion of common-law privacy also resolves your assertion of constitutional privacy.

telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold any home address or telephone number of a licensed peace officer that appears in the requested documents. In addition, section 552.117 requires you to withhold any home address or telephone number of an official or employee who requested that this information be kept confidential under section 552.024. You may not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made. See Open Records Decision No. 530 (1989) at 5 (concluding that whether a particular piece of information is public must be determined at the time the request for it is made). The remainder of the submitted information, except as noted above, must be released in its entirety.

Finally, we note that the information submitted to us for review includes a photograph depicting an applicant who we suspect is now a peace officer. Section 552.119 of the Government Code prohibits the public release of photographs depicting a peace officer. Section 552.119(a) of the Government Code excepts from required public disclosure:

[A] photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, . . . unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

In Open Records Decision No. 502 (1988), this office concluded that the language in section 552.119 "protects from required disclosure all photographs of peace officers unless the circumstances in subsections [(1), (2), and/or (3) of section 552.119(a)] occur or the peace officer gives written consent to release as provided in section [552.119(b)]." Open Records Decision No. 502 (quoting from the summary). Section 552.119(b) provides that information excepted from disclosure by section 552.119(a) may be released "only if the peace officer or security officer gives written consent to the disclosure."

You do not indicate, nor is it otherwise apparent, that the individual depicted in the submitted photograph has consented to the release of the photograph pursuant to section 552.119(b). We do not understand any of the situations described in subsections (1), (2), or (3) to be applicable here. Therefore, we conclude that you must withhold the submitted photograph if the individual in it is a licensed peace officer, unless the individual consents to its release or any of the conditions set forth in subsections (1), (2), or (3) arise.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Margaret A. Roll". The signature is written in a cursive, flowing style.

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 29681

Enclosures: Marked documents

cc: Ms. Jennifer Mena
Reporter
Fort Worth Star-Telegram
P.O. Box 1088
Arlington, Texas 76004
(w/o enclosures)